Supreme Court, U.S.
FILED
FEB 5 2003
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No. 02-783

In the Supreme Court of the United States

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION,

Petitioner,

v.

TENNESSEE REGULATORY AUTHORITY, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Tennessee

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR PETITIONERS

The petition explains that the Tennessee Supreme Court improperly evaluated the TRA's co-branding requirement under the "reasonable relationship" test of *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985), when it should have applied the more rigorous standard of *Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557 (1980). Despite the Tennessee Supreme Court's statement that *Zauderer* sets forth "the defining test for First Amendment analysis of compelled speech cases" (Pet. App. 24a), the TRA apparently agrees with us that *Zauderer*'s "reasonable relationship" test does not govern *all* compelled commercial speech. Br. in Opp. at 9. Instead, the TRA contends (*id.*) that *Zauderer* applies only to disclosure requirements relating "to any need to prevent consumer confusion." The TRA argues that its orders had this goal; that the Tennessee Supreme Court's decision turned on that fact; and that the petition accordingly is "built entirely on a mischaracterization" of the court's opinion.

The TRA's argument that the decision below is consistent with *Zauderer* is plainly wrong. *Zauderer* turned on this Court's finding that, without the disclaimers mandated by the government, the advertisements at issue would themselves have misled consumers. Here, neither the TRA nor the Tennessee Supreme Court has ever found that BAPCO's directory covers are misleading. To the contrary, the TRA conceded, in this very proceeding, that directory covers containing only BellSouth's name and logo are neither deceptive nor confusing: it expressly advised the court below that it "[did] not dispute the implicit finding by the majority of the Court of Appeals that the speech *is not misleading* * * *." Application for Permission to Appeal Pursuant to Tenn. R. App. P. 11, at 14 n. 17 (emphasis added).

In light of this concession, and the absence of any basis to conclude that the directory covers are misleading, the TRA

is forced to argue that *Zauderer* applies to any compelled disclosure that "operate[s] to dispel consumer confusion in either purpose or effect" (Br. in Opp. 10), *even when the regulated speech does not itself confuse or mislead.* Under that construction of *Zauderer*, the government would be able to impose disclosure requirements on non-misleading commercial speech simply by asserting that some consumers are ill-informed about the matters at issue. This Court's precedents establish, however, that the First Amendment affords far greater protection to truthful and non-misleading commercial speech. In any event, the TRA has not even established here that any consumer confusion exists or that the co-branding of BAPCO's directory will ameliorate it.

1. The Tennessee Supreme Court's decision rests on a radical misreading of *Zauderer.* Although no party argued that *Zauderer* applied, the court below held that *Zauderer*'s "reasonable relationship" test governs *all* cases involving compelled commercial speech. Citing its prior decision in *Walker* v. *Board of Professional Responsibility*, 38 S.W. 3d 540, 545 (Tenn. 2001), the court explained that it had found "the distinction between restricted speech cases and compelled speech cases" to be "significant" (Pet. App. 24a); deemed regulations that "require[ ] disclosure rather than prohibition" to be "less objectionable under the First Amendment" (*id.*); and adopted "the more forgiving standard * * * in *Zauderer* [ ] as the defining test for First Amendment analysis of compelled speech cases." *Id.*

Nothing in *Zauderer* suggests that that decision was intended to apply so broadly. This Court approved the government-mandated disclosure in *Zauderer* under a "reasonable relationship" test because it was "self-evident" that, without that disclosure, the advertisement at issue would have been "deceptive" to consumers. 471 U.S. at 652-653. Prior to *Zauderer*, the Court had held that while "[m]isleading advertising may be prohibited entirely," *In re R.M.J.*, 455 U.S. 191, 203 (1983), "the States may not place an absolute prohi-

bition on certain type of misleading information * * * if the information also may be presented in a way that is not deceptive." *Id.*; see also *Virginia State Bd. of Pharm.* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 772 n. 24 (1976) (the State may require commercial messages to "include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive"). *Zauderer* governs where regulation short of a ban can be used to render commercial speech non-misleading; but its relatively lenient standard of review comes into play only *after* the threshold showing of deceptiveness has been made.

As noted above, the TRA has acknowledged that BAPCO's covers are *not* misleading (see Pet. 23), and no court has ever made a contrary finding. Thus, the Tennessee Supreme Court did *not* conclude, as *Zauderer* requires, that the mandatory co-branding of BAPCO's directory had the purpose of preventing the covers from misleading the public. Instead, the court stated that the purpose of the TRA's orders was to "directly advance competition in the provision of local telephone services by effectively informing consumers as to the existence of alternative local telephone services." Pet. App. 27a. See also *id.* at 26a ("The ultimate object of the regulations * * * is * * * to inform consumers."); *id.* at 28a ("informing consumers about their choices in the local telecommunications service market is a fundamental aspect of promoting free competition"). There is a significant difference between "informing consumers" and preventing deception.

The TRA hangs its hat on the Tennessee Supreme Court's statement that the orders "are intended to 'prevent consumers from mistakenly believing that no alternative providers of telecommunications services are available' in the local exchange market, save BellSouth." Br. in Opp. 9 (quoting Pet. App. 26a). But the observation that some consumers may have a "mistaken belie[f]" about the existence of competition is a far cry from a holding that *the directory covers*

themselves mislead or confuse consumers. Put another way, the fact that the TRA's orders would allow BellSouth's competitors "to increase the public awareness of [their] brand[s] without incurring the expense of a marketing campaign" (Pet. App. 8) does not mean that the orders "prevent[ ] deception of consumers" (471 U.S. at 638) within the meaning of *Zauderer*.

Furthermore, the record contains no evidence *either* that consumer confusion actually exists *or* that the directory covers make it worse. Nor is there any common-sense basis to find the covers misleading: they convey accurately that a BellSouth company publishes the directories but that the books include listings for customers served by other carriers. Thus, the TRA seeks to invoke the dramatically reduced standard of review associated with *Zauderer* on the basis of nothing more than unsupported assertions. But the "rote invocation" of words such as "'potentially misleading'" is insufficient to avoid the careful analysis that *Central Hudson* requires. See *Ibanez* v. *Florida Dep't of Business and Prof'l Regulation*, 512 U.S. 136, 146 (1994).

2. Because the Tennessee Supreme Court applied *Zauderer* without any finding that the TRA's orders were aimed at correcting otherwise deceptive speech, the decision *does* plainly conflict with *Mason* v. *Florida Bar*, 208 F.3d 952 (11th Cir. 2000). There, as respondent acknowledges (Br. in Opp. 10), the Eleventh Circuit declined to apply *Zauderer* because, in its view, the advertisement at issue was not "dangerously misleading." 208 F.3d at 957. Instead, the court applied the more searching *Central Hudson* standard and concluded that the Florida Bar's disclosure requirements violated the First Amendment. See *id.* at 952.

The Tennessee Supreme Court's approach also conflicts with *International Dairy Foods Association ("IDFA")* v. *Amestoy*, 92 F.3d 67 (2d Cir. 1996), in which the court struck down a requirement that dairy manufacturers disclose their

treatment of cows with synthetic growth hormone. As the TRA recognizes, "[l]ike the Eleventh Circuit in *Mason*, the Second Circuit tested the requirement under *Central Hudson* rather than *Zauderer*, because its asserted purpose was merely to provide consumers with additional information about the product involved, rather than * * * to dispel consumer confusion absent the compelled disclosure." Br. in Opp. at 11. Here, in contrast, the court below applied *Zauderer* despite the fact that the TRA merely wished to "inform consumers" about BellSouth's competitors.

Moreover, there *is* a trend to apply *Zauderer* indiscriminately to *all* cases involving compelled commercial speech. That trend is exemplified both by the decision below and by *National Electrical Manufacturers Ass'n ("NEMA")* v. *Sorrell*, 272 F.3d 104 (2d Cir. 2001), in which the Second Circuit (relying on *Zauderer*) upheld a labeling requirement after concluding that the First Amendment "is satisfied * * * by a rational connection between the purpose of a commercial disclosure requirement and the means employed to realize that purpose." *Id.* at 115. The TRA dismisses *NEMA* as evidencing only an intra-circuit split (Br. in Opp. 11), but does not dispute that the Second Circuit in *NEMA* – in conflict with the Eleventh Circuit – applied the *Zauderer* test to a compelled disclosure that had nothing at all to do with preventing consumer confusion or deception. Other courts have concluded as well that *Zauderer* applies to *all* disclosure requirements. See Pet. 18-19.

3. The TRA also contends (Br. in Opp. 12-14) that the petition should be denied because its orders survive scrutiny under both *Zauderer* and *Central Hudson*. As discussed above, the orders do not satisfy *Zauderer* because they do not address a demonstrated risk that consumers will be deceived or confused by BAPCO's directory covers. Moreover, the TRA has failed to refute our showing (Pet. 25-26) that its orders fail the *Central Hudson* test.

Assuming the substantiality of the government's asserted interest in "mak[ing] consumers aware that they now have a choice of local exchange service carriers" (Br. in Opp. 14), the TRA still must show, under the third prong of *Central Hudson*, that the orders "directly and materially advance" that interest. *Ibanez*, 512 U.S. at 143. The agency cannot do that, because it never even examined whether placing multiple company logos on the cover of the incumbent's telephone directories would meaningfully increase consumers' awareness that they may choose among different providers of local telephone service. Instead, the TRA simply acceded to AT&T's petition after concluding that its old regulation supported it (Pet. App. 150a) and that publication of the trademarks of local providers would "be helpful to consumers" (*id.* at 151a) – ignoring the undisputed evidence (see Pet. 5) that the co-branding would actually *increase* consumer confusion.

The TRA now claims, of necessity, that the efficacy of its orders is a matter of "simple common sense" that need not be demonstrated empirically. Br. in Opp. 14. But the government's burden to satisfy the third prong of *Central Hudson* "is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Greater New Orleans Broad. Ass'n* v. *United States*, 527 U.S. 188 (1999) (quoting *Edenfeld* v. *Fane*, 507 U.S. 761, 770 (1993)). "[W]ithout any findings of fact, or indeed any evidentiary support whatsoever" (*44 Liquormart Inc.* v. *Rhode Island*, 517 U.S. 484, 505 (1996)), it is impossible to conclude that the TRA's orders "will *significantly* advance the State's interest." *Id.* (emphasis added).[1]

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[1] Citing *Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 628 (1995), the TRA contends that "common sense" alone can satisfy

The TRA also has failed to meet its burden under the fourth prong of *Central Hudson*: it has not demonstrated that the orders are "not more extensive than necessary" to serve its stated interests. *Greater New Orleans Broad. Ass'n*, 527 U.S. at 188. "[I]f the Government [can] achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so." *Thompson* v. *Western States Med. Ctr.*, 122 S. Ct. 1497, 1506, 1507 (2002) (striking down FDA advertising restrictions because "there is no hint that the Government even considered" alternatives to those restrictions). The TRA never even explored whether less substantial intrusions on BAPCO's First Amendment rights would serve its interest in informing consumers about the existence of competition. "If the First Amendment means anything, it means that regulating speech must be the last – not first – resort." *Thompson*, 122 S. Ct at 1507. "Yet here" – as was the case with the advertising restrictions invalidated in *Thompson* – "it seems to have been the first strategy the Government thought to try." *Id.* at 1507.

To satisfy *Central Hudson*, moreover, the government must "'carefully calculat[e] the costs and benefits associated with the burden on speech imposed' by [its] regulations." *Lorrilard Tobacco Co.* v. *Reilly*, 121 S. Ct. 2404, 2425 (2001) (quoting *Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 417 (1993)). As the amicus brief filed by the Yellow Pages Integrated Media Association ("Yellow Pages

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the government's burden under the third prong of *Central Hudson*. In fact, the Court noted in that decision that it had previously approved a restriction on speech "based solely on history, consensus, *and* 'simple common sense'" (515 U.S. at 628 (quoting *Burson* v. *Freeman*, 504 U.S. 191, 211 (1992)) (emphasis added)) – not on common sense alone. And in *Florida Bar*, the Court expressly noted that the Bar had supported its speech restriction with anecdotal evidence that was "noteworthy for its breadth and detail." 515 U.S. at 627.

IMA") explains (at 5-14), restricting a company's use of its trademark to identify its product imposes very substantial costs. Yet the TRA gave no consideration whatsoever to those burdens when it ordered BAPCO to imprint its directory covers with the trademarks of unrelated companies.

Finally, the TRA's orders plainly are not the least restrictive means of fostering competition. Neither the Telecommunications Act of 1996 (the "Act"), which had the goal of opening local telephone service to competition, nor the Federal Communications Commission's rules implementing the Act, require incumbents to give competing local exchange carriers access to directory covers. See 47 U.S.C. § 271(c)(2)(B)(viii); 47 C.F.R. § 51.217(c)(3)(i).[2] Moreover, other state public utility commissions have deemed it sufficient for the incumbent to provide information about competitors *inside* the directories (as BAPCO did prior to the orders in this case). See Yellow Pages IMA Br. 16-18. Indeed, before the TRA issued its orders, BAPCO did *more* than many jurisdictions require by stating on the front cover of its directories that they include numbers served by all local exchange carriers. And, of course, BellSouth's competitors can (and do) advertise their provision of local telephone service through countless outlets other than BAPCO's directory covers.

4. As we demonstrated in the petition (at 26-30), the TRA's orders also offend principles recognized by this Court in *Pacific Gas & Electric Co.* v. *Public Utils. Comm'n*, 475 U.S. 1 (1986), and *United States* v. *United Foods, Inc.*, 533 U.S. 405 (2001). The TRA does not refute our showing that

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[2] The FCC recently approved BellSouth's application to begin providing long distance service in Tennessee after concluding that BellSouth had take the steps necessary to open the local exchange market to competition and observing that BellSouth's competitors had gained a double-digit market share in the state. FCC Order No. 02-331, WC Docket No. 02-307 (Dec. 19, 2002), at 2-4.

this case provides the Court with an important opportunity to consider the doctrines discussed in these cases in the context of compelled commercial speech.

a. In *Pacific Gas*, the Court held that a corporation (a public utility operating in a highly regulated area) had a First Amendment right not to disseminate statements with which it disagreed. The TRA argues – and we acknowledged in the petition (at 28) – that *Pacific Gas* concerned public speech whereas this case involves commercial speech. But that is a reason to grant, not to deny, the petition: this case provides the Court with an opportunity to develop its First Amendment jurisprudence by examining whether, and in what circumstances, a corporation may be forced to publish *commercial* messages with which it disagrees.

Moreover, the TRA greatly overstates its case when it argues that BAPCO is being required to utter "a simple proposition of fact with which no one can disagree." Br. in Opp. 15. The display of a trademark is not merely a factual statement: trademarks are valuable because they both identify products and convey multifaceted messages to consumers – including any negative impressions associated with a particular brand. See *Mishawaka Rubber & Woolen Mfg. Co.* v. *S.S. Kresge Co.*, 316 U.S. 203, 205 (1942) ("A trade-mark is a merchandising short-cut which * * * [t]he owner * * * exploits * * * by making every effort to impregnate the atmosphere of the market with the drawing power of a congenial symbol"); Yellow Pages IMA Br. 9-10 (explaining that the "genuine producer will be saddled with any unfavorable associations that come with the third party trademarks"). That is why AT&T was not satisfied with a factual statement that carriers other than BellSouth serve local customers in Tennessee, but sought to have its *logo* printed on the cover. BAPCO's desire to avoid forced association with the commercial symbols of its competitors is an important interest that merits significant First Amendment protection.

b. The TRA's effort to obscure the relevance of *United Foods* also fails. The TRA acknowledges (Br. in Opp. 15) that the advertising subsidy program at issue in *United Foods* violated the First Amendment because it forced a mushroom producer to endorse the message that its competitors' unbranded goods were worthy of consumption. The TRA does not dispute that a company that is compelled to disseminate an objectionable message *directly* faces an even greater affront to its First Amendment rights.

The TRA contends that its orders pass muster under *United Foods* because they force BellSouth only to disclose "the existence and identities of its competitors in the local telephone exchange services market." *Id.* at 16. As discussed above, however, that is an entirely unrealistic description of the messages that BAPCO has been ordered to communicate. In fact, by carrying the logos of its competitors, BAPCO may be conveying implicitly, for example: that BellSouth and the other companies are "one big family" that cooperatively provide telephone service; that BAPCO and the other companies worked together to produce and distribute the phone book; that BAPCO approves of the other companies' business conduct, advertising, and quality of service; and/or that there is no difference between BellSouth and other companies.

In addition, unlike in *United Foods*, BellSouth is not merely subsidizing objectionable speech, but is carrying these messages directly. In failing to recognize the importance of BAPCO's First Amendment right *not* to publish the commercial messages of its competitors and to employ its own trademark to identify and differentiate its products, the Tennessee Supreme Court has rendered a decision that plainly merits review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2003